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SUPREME COURT of the UNITED STATES

October Term, 1949

No. 612

DOROTHY MAY ARNOLD DAVIS,
Petitioner,

vs.

GRETCHEN A. PROSE AND THE UNITED STATES OF AMERICA,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT, GRETCHEN A. PROSE, IN OPPOSITION

COUNTER STATEMENT OF THE CASE

Respondent, Gretchen A. Prose, introduced seven letters written by deceased soldier to her, being Exhibits 1, 2, 3, 4, 5, 6 and 7. Exhibit 1 is a letter dated April 6, 1944, and contains following language:

> "Sis i told you i would have to get my papers all changed ill have to have Popies name taken off and Put yours to them so ill give them your address at T. H." (R. 84)

Exhibit 2 is a letter dated April 9, 1944, and contains following language:

> "Sis, i am getting my papers fixed they will be all in your name and I am going to have alotment taken out and send it to you to." (R. 84)

Exhibit 3 is a letter dated April 11, 1944, and contains following language:

> "Well sis don't worry about my Pappers weather i had them changed or not i got them all fixed up again this morning so they are all made to you so they will be sent to T. Haute they ask me where my address was now so i made it to 2204 N. 14th St. same as yours. And my class (E) alotment will be sent to you all so but i haven't saw the clerk yet but i am tonight so it will be sent to terre Haute."
>
> Also, "Sis you can tell Mrs. Prose what to do with your papers when she gets any." (R. 84)

Exhibit 4 is a letter dated April 12, 1944, and contains following language:

> "Have you heard from Dorothy lately or not. i have only heard once from her since i came back but it does not matter so much now i guess."
>
> "Sis thoes to papers unckle Ira has got of mine they said you would get a new one that they was no good but you know where they are if you do need them but you will get all the new one now." (R. 85)

Exhibit 5 is a letter dated April 27, 1944, and contains following language:

> "Sis, i have had all my papers changed now they are all made to you i had a $25.00 alotment made to you so

you will be getting it before long, but all the papers and alotment is made to terre Haute so you can tell Mrs. Prose to mail them to you. you better have her to mail all of them to you so you can tell what they are"

Also, "Well sis i better ring off for this time so you can tell Mrs. Prose about your Papers what to do but it would be better if you have them sent to you for a while any way." (R. 85)

Exhibit 6 is a letter dated April 28, 1944, and contains following language:

"Sis, I thing i wrote last night and told you i had all my papers changed and a Class E alotment i had $25.00 taken out and sent to you but all the papers and your check will go to T.H. so you had better tell Mrs. Prose to send them to you anyway for awhile." (R. 85)

Exhibit 7 is a letter dated May 6, 1944, and contains following language:

"Sis you was woundering weather i had my Papers fixed i had all of them fixed I took out alotment but they will go to Terre Haute you should get it before long." (R. 86)

Assured soldier's service record was received in evidence by stipulation. (R. 17) Page 2 of said service record is as follows:

"Home address—Worthington, Indiana; Name and address of nearest relative—Charles A. Arnold, father, same as above; Person to be notified in case of emergency—same as above; Designation of beneficiary—Mary A. Arnold, wife, 526 Fletcher Avenue, Indianapolis, Indiana —Charles A. Morgan, father, Worthington, Indiana. (alternate beneficiary)—Gretchen M. Arnold, sister, (alternate beneficiary)"

A line was drawn diagonally through all of this and marked "Void—RJA 11 Apr 44" (R. 86)

Insert 3 of said service record is as follows:

> "Home Address: 2204 North 14th St., Terre Haute, Indiana.
> Name and address of nearest relative
> Gretchen M. Prose Sister
> 2204 North 14th St., Terrehaute, Indiana.
> Person to be notified in emergency:
> Gretchen M. Prose Sister
> 2204 North 14th St., Terrehaute, Indiana.
> Designation of Beneficiary:
> Gretchen M. Prose Sister
> 2204 North 14th St., Terrehaute, Ind.
> Soldier declines to designate alternate beneficiary to receive this pay.
> WD AGO Form 41 sent AG 11 April 1944." (R. 87)

Certification of the service record states that no record has been found of WD AGO Form 41 executed by deceased soldier and referred to in Insert 3 of said service record. (R. 87)

ARGUMENT

There was no contradiction of the evidence which was introduced in this case; the conflict lies in the conclusion and legal effect to be drawn from and given to the undisputed facts as shown by respondent's evidence. Petitioner does not deny that the insured soldier manifested an intention to make respondent the beneficiary of the policy sued upon, but the petitioner claims that the affirmative acts performed by the soldier were not sufficient to effectuate his intention.

The evidence of the insured soldier's intention to name re-

spondent the beneficiary of his insurance is overwhelming. Eight witnesses in addition to respondent testified that the insured soldier informed them that as soon as he got back to camp he was going to make respondent, his sister, beneficiary of all of his government insurance. (R. 20-27) After arriving at Camp Butner, N. C., he asked both his sergeant, who at the time of the trial was an employee of the Veterans Administration at Alexandria, Minnesota, and his lieutenant for advice, assistance, and permission to go to personnel office for purpose of changing his insurance and making all of his insurance over to his sister, respondent herein. (R. 37, 41, 42) The sergeant and lieutenant both inquired independently as a part of their duty whether he had made the change, and he told them "he had his insurance completed, signed all the forms, and that as far as he knew everything was in order", and "that he had had it changed to his sister", (respondent herein). (R. 43) This indicates that he thought he had completed the necessary formalities in writing to effect the change as was stated in the written opinion of Judge Kerner of the United States Court of Appeals for the Seventh Circuit. (R. 114) Upon his return he informed his sergeant and lieutenant that he had made his sister, respondent herein, beneficiary of all of his insurance. (R. 37, 43) Just before leaving for overseas he informed his lieutenant, upon inquiry by the lieutenant, that he had insurance to the extent of $10,000.00 and that his sister, respondent herein, was beneficiary thereof, and said lieutenant refreshed his memory from a personal record card concerning the soldier, the lieutenant having kept a personal record card for each member of his platoon. (R. 47) Insert 3 of the service record shows that Gretchen M. Prose was designated by the soldier as beneficiary. (R. 87) Petitioner did not contradict any of respondent's evidence. The sergeant and lieutenant were disinterested witnesses, and their testi-

mony was direct, definite, and unequivocal. Petitioner did not impeach any of respondent's witnesses, and petitioner did not show that the sergeant and lieutenant had any interest in this litigation, and the Court of Appeals was clearly correct in stating that they were convinced that the District Court's finding was clearly erroneous and hence was reversible.[1]

Respondent's Argument

Strict Compliance With Regulations of Veterans Administration Not Essential

It is the duty of the courts to give effect to the wishes and intentions of the assured while in the service, if it is reasonably possible to ascertain them from the available evidence which they leave behind when giving their lives in defense of their country. It is not required that the rigid forms of the regulations of the Veterans Administration be followed but sufficient if the intention is made certain and affirmative action taken to express it. The exigencies of war and fairness to the soldier are the reasons unanimously asserted by all the cases for this rule.[2]

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[1] *Shapiro v. United States*, 166 F. (2d) 240, cert. den. 334 U. S. 859; *Mitchell v. United States*, 165 F. (2d) 758; *McKewen v. McKewen*, 165 F. (2d) 761, cert. den. 330 U. S. 829; *Collins v. United States*, 161 F. (2d) 64, cert. den. 331 U. S. 859; *Bradley v. United States*, 143 F. (2d) 573, cert. den. 323 U. S. 793; *Roberts v. United States*, 157 F. (2d) 906; *Rosenschein v. Citron*, 169 F. (2d) 885; *Egleston v. United States*, 71 F. Supp. 114, affirmed 168 F. (2d) 67; *Van Doren v. United States*, 68 F. Supp. 222; *White v. United States*, 270 U. S. 175, 46 S. Ct. 274, 70 L. Ed. 530; *Gann v. Meek*, 165 F. (2d) 857; *Zazove v. United States*, 156 F. (2d), 24, 25; *Claffy v. Forbes*, 280 F. 233.

[2] *Rutledge v. United States*, 72 F. Supp. 352; *Citron v. United States*, 69 F. Supp. 830; *Walker v. United States*, 70 F. Supp. 422; *Van Doren v. United States, supra; Roberts v. United States, supra; Farley v. United States*, 291 F. 238; *Gann v. Meek, supra; Bradley v. United States, supra; Collins v. United States, supra; McKewen v. McKewen, supra; Mitchell v. United States, supra; White v. United States, supra; Woods v. United States*, 69 F. Supp. 760.

Affirmative Acts Performed By Soldier To Effectuate His Intention

a. Seven letters to respondent.

b. Page 2 of soldier's service record in which former designation of beneficiary was marked void on April 11, 1944.

c. Insert 3 of soldier's service record which shows that WD AGO Form 41 was sent to Adjutant General 11 April 1944. Said insert 3 also shows that respondent was designated as soldier's beneficiary and that he named her as his nearest relative and person to be notified in case of emergency.

d. Soldier's inquiry to superior officers as to how to make respondent beneficiary of all of his insurance, and his following instructions and upon his return informing his superior officers that he had signed all the forms and succeeded in making respondent beneficiary of all of his insurance.

e. Personal record kept by lieutenant showing that soldier had $10,000.00 of insurance and that respondent was beneficiary.

The above not only shows the conduct of the soldier to effectuate his intention, but also shows that he executed several writings to effectuate his intention to make respondent beneficiary of all of his insurance.

WD AGO Form 41 appears to have been frequently used in the Army by mistake to effect a change of beneficiary of insurance and the courts have recognized and permitted its use for that purpose.[3]

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[3]*Shapiro v. United States, supra; Van Doren v. United States, supra; Citron v. United States, supra.*

Reply To Petitioner's Argument

Petitioner seems to rely solely upon the case of *Cohn v. Cohn*, 171 F. (2d) 288, cert. den. 93 L. Ed. 839, and also *Farmakis v. Farmakis*, 182 F. (2d) 291, cert. den. 69 S. Ct. 1535. In the Farmakis case and the Cohn case the court held that a writing is the minimum requisite to a change of beneficiary, and that due to war conditions the form of the writing was immaterial. However, in the case of *Gann v. Meek*, supra, the court held that a mere letter written by soldier to his brother that he had changed his beneficiary warranted the inference that he had already written to Veterans Administration requesting such change before he wrote the letter and this writing was held sufficient to effectuate a change. In the *Shapiro* case, cited supra, it was also held that the execution of WD AGO Form 41 entitled "Designation of Beneficiary" was sufficient to effectuate a change of beneficiary. There is no conflict in the decisions of the various circuit courts of appeal, but only as to what is the requisite amount of writing required.

The evidence is uncontradicted that the soldier asked advice and assistance from his superior officers, and also permission to go to the personnel office in order to change his insurance and that it was his insurance that he was primarily interested in taking care of. Each of his superior officers as a part of their duty inquired whether he had made the change and the soldier told each of them that he had "signed all forms", thus indicating as stated in the opinion of the Court of Appeals that he had completed the necessary formalities in writing to effect the change. The soldier's service record corroborates this fact as the former designation of beneficiary was marked "Void" on April 11, 1944, WD AGO Form 41 was sent to Adjutant General April 11, 1944, and the soldier's letter dated April 11, 1944, in which he informed respondent that he had had all of

his papers changed and "I got them all fixed up this morning", and this would definitely contradict the assertion that the execution of WD AGO Form 41 was executed solely for the purposing of designating a beneficiary of death gratuity pay.

Petitioner asserts that the decision of the Court of Appeals is in conflict with the decision of this court in the case of *United States v. Yellow Cab Company*, No. 22, October Term, 1949, decided December 5, 1949, (94 L. Ed. 123), in that the Court of Appeals tried this case de novo on the record, rejected the special findings of the trial court, and substituted therefor its own. Respondent claims that the above case does not bear out petitioner's contention for the reason that in the above cited case the District Court believed the oral evidence of the defendant's officers who made the records and interpreted the written documents in view of the oral testimony, and there being two permissible views of the weight of the evidence, the Supreme Court refused to reverse the District Court. The Supreme Court further stated that it was its duty to correct clear error, even in findings of fact. In the case at bar, as stated by the Court of Appeals, it does not appear from the findings of the trial court whether he believed all of respondent's evidence or whether he considered it insufficient to effectuate the designation of the respondent as beneficiary of the soldier's insurance. Clear error was committed by the trial court, and hence reversible and subject to mandate.[4]

The petitioner claims that insert 3 of the soldier's service record is not to be considered as any evidence effecting a change of beneficiary. In connection with insert 3 of the service record (R. 92, 93), in which the former designation of bene-

[4]*Himmel Bros. Co. v. Serrick Corporation*, 122 F. (2d) 740; *Carter Oil Co. v. McQuigg*, 112 F. (2d) 275; *United States v. United States Gypsum Co.*, 333 U. S. 364, 394, 395.

ficiary was marked "Void" on April 11, 1944, we also call attention to that part of insert 3 of the service record which states that Gretchen M. Prose was named beneficiary and that soldier declined to designate alternate beneficiary and that "WD AGO Form 41 sent AG 11 April, 1944". The former designation of beneficiary was marked "Void" and the execution of WD AGO Form 41 were on the same date, to-wit: April 11, 1944, and also the letter of the soldier to respondent bearing date of April 11, 1944, states that "all my papers were changed and they are all made out to you" (respondent.) Petitioner has laid great stress upon discrepancy of names Gretchen A. Prose and Gretchen M. Prose. The evidence shows respondent's surname was Arnold before marrying Prose, and before her marriage she went by name Gretchen M. or Gretchen Maxine and after her marriage she was sometimes referred to as Gretchen A. and at other times Gretchen M. Petitioner has not denied that Gretchen M. Prose and Gretchen A. Prose are the same and identical person.

The respondent admits that she was not designated as beneficiary on the insurance certificate in question, but asserts that it was the clear intention of her brother, the assured soldier, to make her the beneficiary of the policy sued upon after the death of their father, and that the soldier performed an overwhelmingly number of sufficient affirmative acts to effectuate his designation of her as the beneficiary of all of his insurance.

It was stipulated as evidence in the trial court that respondent had theretofore exhausted all administrative measures available to her for the collection of the proceeds of the policy of insurance sued upon and that the trial court had jurisdiction of this cause. (R. 76).

Importance of Questions

No new questions are presented by this petition. Certiorari

has heretofore been denied in a number of cases by the Supreme Court in which the evidence was not as decisive as here.[5]

The United States by its answer admitted that it was liable on said contract of insurance to the beneficiary lawfully entitled thereto and that it stood ready and willing to pay said insurance, but because of conflicting claims the United States could not safely make payment without the aid of the court, (R. 6, 7, 14, 15), and the United States by its attorney admitted in the trial court that it was a mere stakeholder. (R. 17) Therefore, it appears that the government does not consider a review would be helpful to the administration of the program of Veterans insurance or any other governmental function.

CONCLUSION

It is respectfully submitted that the petition for certiorari has no merit and should be denied.

Respectfully submitted,

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[5]*Bradley v. U. S., supra; Roberts v. U. S., supra; McKewen v. McKewen, supra; Shapiro v. U. S., supra; Farmakis v. Farmakis, supra.*